INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
1. Interference, restraint, and coercion	3
2. Petitioner's refusal to bargain in good faith	5
3. The strike against the Company	8
4. The Company's refusal to reinstate the strikers	11
B. The Board's conclusions and order	11
C. The proceedings in the Court of Appeals	13
Argument	15
Conclusion	22
Appendix	23

CITATIONS

Cases:	
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261	19
Angwell Curtain Co. v. *National Labor Relations Board*, 192 F. 2d 899	21
Bigelow v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111	18
Brick & Clay Workers of America v. *Deena Artware, Inc.*, 198 F. 2d 637, certiorari denied, December 8, 1952	14, 15
Cusano v. *National Labor Relations Board*, 190 F. 2d 898	22
Federal Trade Commission v. *Cement Institute*, 333 U. S. 683	20
Firth Carpet Co. v. *National Labor Relations Board*, 129 F. 2d 633	22
General Pictures Co. v. *Electric Co.*, 304 U. S. 175	21
International Longshoremen's & Warehousemen's Union v. *Juneau Spruce Corp.*, 342 U. S. 237	17, 18
Lane v. *National Labor Relations Board*, 186 F. 2d 671	19
Litchfield v. *Goodnow's Administrator*, 123 U. S. 549	18
McCullough v. *Kammerer Corp.*, 323 U. S. 327	17
National Labor Relations Board v. *Clausen*, 188 F. 2d 439, certiorari denied, 342 U. S. 868	20
National Labor Relations Board v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333	22
National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241	20

Cases—Continued	Page
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261	20
National Labor Relations Board v. *Seven-Up Bottling Co.*, No. 217, this term, decided January 12, 1953	17
National Labor Relations Board v. *Wallick & Schwalm*, 198 F. 2d 477	21
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350	19
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*)	2
Section 7	23
Section 8 (a) (1)	3, 23
Section 8 (a) (3)	3, 23
Section 8 (a) (5)	3, 24
Section 8 (b) (4) (A)	18, 24
Section 8 (b) (4) (D)	24
Section 10 (a)	24
Section 10 (e)	16, 25
Title III:	
Section 303 (a)	26
Section 303 (a) (1)	18, 26
Section 303 (a) (4)	18, 26
Section 303 (b)	27
Miscellaneous:	
Comment, 61 Yale L. J. 745 (1952)	20

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 518

DEENA ARTWARE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1150–1162) is reported at 198 F. 2d 645. The findings of fact, conclusions of law, and order of the Board (R. 60–177, 191–199, 985–999, 1001–1004) are reported at 86 NLRB 732 and 95 NLRB 9.

JURISDICTION

The judgment of the court below (R. 1149–1162) was entered on July 30, 1952. A petition for rehearing filed by petitioner on August 14, 1952 (R. 1163) was denied on October 1, 1952 (R. 1179). The petition for writ of certiorari

was filed on December 29, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

Petitioner's question numbered 1 (Pet., p. 3)—whether a finding by a jury in the District Court that the Union violated Section 303 (a) (1) of Title III of the Act is *res judicata* so as to preclude the Board from finding that the Union did not violate Section 8 (b) (4) (A) of Title I of the Act—was not properly put in issue before the Board or the court below. See *infra,* pp. 16–17.

The other questions presented are:

2. Whether evidence of events occurring before and after the unfair labor practices alleged in the complaint may be introduced for the purpose of showing the character of the conduct alleged to be unfair.

3. Whether substantial evidence on the record considered as a whole supports the finding of the Board, affirmed by the court below, that a strike engaged in by petitioner's employees was caused by petitioner's unfair labor practices and by petitioner's refusal to accede to the employees' economic demands.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29

U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 23–27.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Board found that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act; refused to bargain in good faith with the certified bargaining representative of its employees, in violation of Section 8 (a) (5) and (1); and discriminatorily refused to reinstate 66 strikers, in violation of Section 8 (a) (3) and (1). The subsidiary facts upon which the Board based its findings may be summarized as follows:

1. *Interference, restraint, and coercion.* In a Board-conducted election held March 17, 1948, a majority of the Company's employees designated the United Brick and Clay Workers, AFL, as their exclusive bargaining representative, and thereafter the Board certified the Union as such representative (R. 65; 291, 885).[1] Prior to the election, as well as thereafter, the Company openly expressed its opposition to the Union, and sought in various ways to thwart the employees' union activities.

Thus, on March 16, 1948, the day preceding the election, G. H. Weiner, the Company's president,

[1] Wherever semicolons appear in record references, the references preceding the semicolon are to the Board's findings and those following are to the supporting evidence.

warned the employees that they would lose their "privileges and freedoms" if the election were won by the Union (R. 68; 282, 546). A day or two after the Union won the election, Weiner told the employees of the Casting Department that he was "going to show 'em" what he would do for "stabbing" him in the back, and he threatened to eliminate all of their overtime earnings (R. 68–69; 786). About the same time, Weiner made a similar remark to the employees of the Mold Department, stating that he was "real mad" because they chose the "side" of the Union (R. 68, 69; 820–821, 823). Early in April, shortly after the commencement of the negotiations between the Union and the Company (discussed *infra,* pp. 5–8), Weiner summoned the Union's negotiating committee to the plant office and there, in the presence of the management committee which represented the Company in collective bargaining, "starting shaking his finger" at the leaders of the Union committee and told them that "if you people are out of work and starving it won't be my fault" (R. 70, 92; 262–263, 280).

Within a few days after the March 17 election, the Company gave effect to its threats. It reduced the employees' working hours from 48 to 40 hours per week, thereby eliminating the employees' overtime earnings (R. 69; 395, 400, 647, 649, 786). It posted signs throughout the establishment prohibiting smoking, and informed the employees that if they were "caught smoking" outside the

rest room they "would be discharged immediately" (R. 71; 271–272, 298–299, 304–305, 543). The Company also abolished the practice of permitting employees who had completed their day's work to walk outside the plant, to take showers, and to clean their tools preparatory to departure (R. 72; 273, 307, 299, 302–303, 543); and revoked the privilege of interchanging work shifts customarily enjoyed by the kiln employees (R. 72; 288–289).

Finally, on July 22, 1948, while the employees were engaged in a strike (*infra,* pp. 8–9), President Weiner publicly announced in a Paducah newspaper that, because of the strike activities of the Union and the employees, he was discontinuing the construction of additional plant facilities at Paducah, was moving the construction materials to another community where he intended to erect a factory, and was abandoning plans "to move our entire operation over a period of time into Paducah" (R. 165; 317, 900–903). Weiner also stated that he would entirely abandon the Paducah plant if "hazards and difficulties are thrown in my way" (*ibid.*).

2. *Petitioner's refusal to bargain in good faith.* Having won the election conducted by the Board on March 17, 1948, the Union immediately thereafter requested the Company to negotiate a collective bargaining contract (R. 66; 202). The parties met for this purpose on several occasions between April 8 and May 7, 1948.

At the second bargaining conference held on April 9, the Company announced that it would not bargain with the Union so long as it retained E. Grimes, an AFL official, on its negotiating committee (R. 66; 205–206, 295, 330–331). Contending that Grimes was not "a member or officer" of the Union, the Company "ordered" him "off the Company property" where the meeting was in progress (*ibid.*). The Union yielded under protest and Grimes did not participate in any further negotiations between the parties (R. 66, 75; 205–206, 295, 330–331).

At the third meeting, the first one on which the parties came to grips over the major issues in dispute, the Company equivocated concerning the authority of its representatives to bind the Company on important issues. The members of the Company's committee gave varying and irreconcilable versions of the committee's authority, ranging from the construction that the committee's actions were "binding on the company" to the construction that "all of the committee's actions" were subject to veto by the Board of Directors or President Weiner (R. 90–91, 192; 207, 220, 283, 338, 415, 532, 533, 669). In the course of the negotiations, President Weiner himself told a union representative that the negotiations were "entirely" in the hands of his attorney who "had full power to act for the Company" (R. 91–92; 259–260).

At the succeeding meetings the parties discussed various provisions of the Union's proposed contract, including those relating to wages, union security, overtime, sick leave, holiday and vacation proposals (R. 86, 96–100; 210–212, 217–224, 256, 340, 342, 345, 347, 607, 679–680). Although the parties were able to agree upon certain minor matters, no agreement was reached on the major issues (R. 86; 221, 219). The Company not only rejected the Union's proposal to continue the established vacation practice of the Company, but proposed to reduce the existing vacation benefits (R. 99; 208–209, 217–218, 222, 413, 888, 901). Although the Company submitted a counter-proposal on wages, the proposal was made orally, and was so complex that even members of the Company's negotiating committee differed among themselves at the hearing in regard to some of its broad and vital aspects, including the over-all impact of the proposed wage scale on the current earnings of the employees (R. 101, 104, 192; 311, 365, 408–409, 675–676, 683–684). And although the employees repeatedly informed the management committee that its wage proposal was without substantial value or meaning to them (R. 101, 192; 268–270, 284, 681), the Company made no effort to clarify it, but instead told the Union that even that offer might later be withdrawn by management (R. 88, 101, 192; 220, 815, 833, 867).

239815—53——2

3. *The strike against the Company.* On May 7, 1948, following the last bargaining conference, the Union held a meeting at which the employees concluded that they had gone "as far as [they] can get in negotiations" and unanimously voted to "go on strike * * * due to the breaking off of negotiations by the Company" (R. 108, 991; 223, 226, 227, 1101–1102). The membership also voted to give Earl Bellew, the Union's international representative "full power and authority to name the day and hour of the strike" (*ibid.*). Bellew decided, however, to postpone the strike until the United States Conciliation Service, whose assistance the parties had previously invoked (R. 108; 219, 224, 225), was given "a chance" to adjust the dispute (R. 108–109, 991; 227–228, 1102).

Thereafter, the Conciliator assigned to the case arranged to meet the representatives of the Union and the Company on May 26 at the offices of the Company's attorney (R. 109; 246–247). The Conciliator, unable to keep the appointment, notified the Company that the meeting would be postponed to May 28 (R. 109; 376). However, because of the Conciliator's difficulty in reaching Bellew, the Union's representative, Bellew did not receive notice of the postponement until May 27, the day following the originally scheduled meeting (R. 109; 246, 250, 376).

In the meantime, Bellew, together with several members of the Union's committee appeared at

the office of the Company's attorney for the May 26 meeting but were told by an office clerk that the meeting had been postponed until May 28 (R. 109; 228–229, 247–248). After receiving a report of this development, the employees agreed that the strike, which they had decided upon at their May 7 meeting (*supra,* p. 8), be put into effect at 2 o'clock that afternoon and Bellew instructed one of the employees so to advise the Company (R. 109–110; 228–230, 248–249, 376).

Pursuant to Bellew's instructions, one of the employees apprised the Company of the Union's strike plan (R. 110; 275). When the Company's representatives asked the employee the reason for the strike, he replied that the May 26 meeting was postponed without notice to the Union and that the Union objected to "getting the run-around" (R. 110; 376). Thereupon the Company's representatives explained that the Conciliator, and not the Company, was responsible for the postponement (*ibid.*).

Sixty-six employees, substantially the entire membership of the local, responded to the committee's strike call (R. 110; 231, 313–314). Picketing activities commenced the same day (R. 110–111).

During the period of the strike, an independent contracting firm was engaged in constructing a new warehouse on the Company's premises; the structure was to be physically joined to the Company's existing warehouse (R. 157, 194, 1003;

the Act (R. 191–193, 64–166, 985–1004). In reaching their conclusion, the trial examiner and the Board rejected the Company's contention that the strike was not a protected concerted activity; this contention was based on the claim that the strike was caused by the Union's displeasure at the postponement of the May 26, 1948 meeting for which the conciliator, and not the Company, was responsible (R. 114–116, 990–995, 1002). The Board found that although the strike was touched off by the postponement of the May 26 meeting for which the Company was not responsible, it was in fact basically provoked by the Company's antecedent unfair labor practices and its refusal to grant the employees' economic demands (*ibid.*). The trial examiner and the Board also rejected the Company's contention that, in any event, the strikers forfeited their right to reinstatement because, among other things, they engaged in an illegal secondary boycott, in violation of Section 8 (b) (4) (A) of the Act (R. 157–162, 194–195, 995–998, 1002–1004). As already stated (*supra,* pp. 10–11), the trial examiner found as a fact that the cessation of work by the construction workers was induced or encouraged not by the Union involved in this proceeding but by the Teamsters Union. The Board, although adopting the trial examiner's factual findings, concluded that the undisputed fact that the picketing was confined to the Company's immediate premises alone warranted the conclusion that it

was protected primary picketing (R 194–195, 1002–1004).

Accordingly, the Board entered a customary remedial order requiring the Company to cease and desist from engaging in the unfair labor practices found; to reinstate and make whole the strikers it had discriminated against; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 195–197).

C. THE PROCEEDINGS IN THE COURT OF APPEALS

On May 8, 1950, the Board filed in the court below a petition for enforcement of its order (R. 1–7). On July 30, 1952, with an immaterial modification (R. 1160), the court below handed down its opinion and entered its decree (R. 1149–1162) enforcing the Board's order in full. The court approved the Board's finding that the strike called on May 26, 1948, was a protected concerted activity, pointing out that although the Company's proof "tended to establish that the postponement of the [scheduled bargaining] meeting touched off the strike, * * * considering the events in their entirety, of which the postponement incident was but a single incident, the [Company's] unfair labor practices and the employees' economic demands were the root causes of the strike" (R. 1158). The court also sustained the Board's conclusion that the strike did not constitute illegal secondary action in violation of Section 8 (b) (4) (A) of the Act. The

court held that substantial evidence on the record as a whole supported the finding of the examiner, adopted by the Board, that the Union did not induce or encourage work stoppages by the construction workers and that any cessation of work by them was induced by the Teamsters, a union not involved in this proceeding (R. 1161). The court recognized that the trial examiner's finding as to the character of the picketing was "inconsistent" with the finding reached by a jury in a proceeding instituted by the Company in the District Court for the Western District of Kentucky, wherein the Company obtained a judgment, under Section 303 of the Act, for damages sustained by the Company by reason of secondary picketing arising out of the same labor dispute (R. 1161–1162; *Brick & Clay Workers of America* v. *Deena Artware, Inc.*, 198 F. 2d 637, 642–643 (C. A. 6), certiorari denied, December 8, 1952). In its opinion in *Brick & Clay Workers,* the court pointed out, however, that such disparity in findings was an inevitable consequence of the statutory creation of two forums for dealing with the same labor dispute; that "each fact finding agency was entitled to make its own decision upon the evidence before it"; and that because both decisions were supportable on their separate records, involving different witnesses and different cross-examination of the same witnesses by different counsel, both were entitled to stand (*ibid.*).

ARGUMENT

On the same day that the decision below was handed down, the court also rendered its decision in *Brick & Clay Workers of America* v. *Deena Artware, Inc., supra,* affirming the judgment of the District Court awarding damages against the Union. In both cases the court below stated that it disagreed with the Board as to the standard that the Board applied to distinguish primary and secondary labor action. Based in part on that disagreement, the Union filed a petition for certiorari in the *Brick and Clay Workers* case, which this Court denied on December 8, 1952, No. 419, October Term, 1952. The petition in this case does not present the question as to the proper standard for differentiating between primary and secondary labor action. The court below also held that the Board's order could be sustained on the alternative theory, based on the standard the court regarded as proper, that the Union had engaged in no secondary labor action. As to this, the court held that the findings of the examiner, adopted by the Board, were supported by substantial evidence and warranted the Board's conclusion. The petition in this case does not deny that the examiner's findings are supported by substantial evidence. The only issue petitioner raises as to the relationship between the two cases is that of *res judicata,* to which we now turn.

1. Petitioner contends that the jury's finding in the District Court proceeding that the Union

violated Section 303 (a) (1) of Title III of the Act is *res judicata* so as to preclude the Board from finding that the Union did not violate Section 8 (b) (4) (A) of Title I of the Act. We shall show that this question (a) is not properly before this Court because not put in issue before the Board or in the court below, and (b) does not, in any event, warrant review.

(a) The District Court judgment was entered on December 15, 1950 (R. 1117). The Board's original order had been entered on October 25, 1949 (R. 101), but on October 12, 1950, the court below granted petitioner's motion to remand the case to the Board to permit petitioner to adduce additional evidence on several matters, including the Union's alleged violation of Section 8 (b) (4) (A) of the Act (R. 979). Neither then, nor previously, nor at the ensuing hearing, held on January 8, 1951, after the District Court judgment was entered (R. 985–987) nor in subsequent proceedings before the Board, did petitioner urge that the District Court judgment was *res judicata*. In the court below, petitioner did not raise this issue at any stage before the court's decision was rendered. After the decision, petitioner urged its *res judicata* contention for the first time in its petition for rehearing (R. 1169–1172), which the court below denied without opinion (R. 1179).

Even if this injection of the issue for the first time on rehearing were otherwise timely, the court below could not consider it, for Section 10 (e) of the Act requires that "No objection that has not

been urged before the Board * * * shall be considered by the court" in the absence of extraordinary circumstances. *National Labor Relations Board* v. *Seven-Up Bottling Co.,* No. 217, this Term, decided January 12, 1953, slip sheet op. p. 6. Accordingly, petitioner requests this Court to consider a question which the Board had no initial opportunity to determine and which could not be reviewed by the court below. Certiorari will not be granted to review a question "not properly raised, litigated or passed upon below". *McCullough* v. *Kammerer Corp.,* 323 U. S. 327, 328.

(b) In any event, the question petitioner poses is insubstantial. It has been settled by this Court that a Section 303 damage action is an independent proceeding which does not affect and is not affected by the administrative determination of the parallel question arising under Section 8 (b) (4). *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.,* 342 U. S. 237, 243–244. There this Court stated that:

> Section 8 (b) (4) (D) and § 303 (a) (4) are substantially identical in the conduct condemned. Section 8 (b) (4) (D) gives rise to an administrative finding; § 303 (a) (4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that *the remedies provided were to be independent of each other.* Certainly there is nothing in the language of § 303 (a)

> (4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by § 303 (a) (4) are rendered unlawful *"for the purposes of this section only,"* thus setting apart for private redress, acts which might also be subjected to the administrative process. [Emphasis supplied.]

The relationship of Section 303 (a) (4) to Section 8 (b) (4) (D), as in *Juneau Spruce,* is the same as the relationship of Section 303 (a) (1) to Section 8 (b) (4) (A), as in this case. Accordingly, in this case, as in *Juneau Spruce,* the private remedy under Section 303 (a) (1) and the public remedy under Section 8 (b) (4) (A) are "independent of each other" and the Section 303 (a) (1) damage judgment is pertinent "for the purposes of * * * section [303 (a) (1)] only."

Furthermore, it is axiomatic that a determination in a judicial proceeding is binding only upon the parties to that proceeding and those in privity to them. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.,* 225 U. S. 111, 126; *Litchfield* v. *Goodnow's Administrator,* 123 U. S. 549. In the Section 303 damage suit, only petitioner and the Union were parties, and the Board did not participate in the proceeding in any capacity. Petitioner attempts to bridge the gap by asserting that the Board and the Union are in privity

(Pet., pp. 5, 15). But it is fundamental that the Board acts in a public capacity to vindicate a public right in the public interest. *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 265, 268–269; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362, 364. The Board does not represent, and is not represented by, private interests. *Ibid.;* see also, *Lane* v. *National Labor Relations Board,* 186 F. 2d 671, 674–675 (C. A. 10). Accordingly, since the Board did not participate in the private proceeding, there is no basis for binding the Board to the result reached in it.

In addition, if *res judicata* were otherwise applicable, there is no chronological basis in this case for according the District Court judgment precedence over the administrative determination. In this case the Board proceeding was actually instituted prior to the commencement of the Section 303 proceeding (R. 60; 34–39, 40, 1111); the Board's original finding respecting the protected character of the picketing antedated the finding by the jury in the District Court (R. 191, 157–162, 1117);[3] the Union took a timely appeal from the

[3] The original order of the Board and the judgment of the District Court were entered on October 25, 1949 and December 15, 1950, respectively (R. 191, 1117). Although the Board, pursuant to an order of the court below, reopened the proceeding on November 13, 1950, to receive further evidence on several matters, including the character of the picketing (R. 978), the evidence adduced thereafter by petitioner was largely cumulative and the Board reaffirmed its original decision (R. 985, 1001).

judgment of the District Court; and the court below determined the issues in the District Court case and the Board case simultaneously and sustained the results reached in both (*supra,* pp. 13–15). In these circumstances, the doctrine of *res judicata,* by definition, could not apply so as to subordinate the administrative to the private determination, for the private suit did not result in a final prior adjudication.

Lastly, if there is any room for *res judicata,* it would seem to require that precedence be given to the administrative determination, for only in that proceeding were all parties joined. And permitting the administrative determination to prevail would have the added advantage of giving effect to the expert judgment. See Comment, 61 Yale L. J. 745 (1952).

2. It is settled, contrary to petitioner's contention (Pet., pp. 5–6, 16–17), that evidence of events occurring before and after the unfair labor practices alleged in the complaint may be introduced for the purpose of showing the character of the conduct alleged to be unfair. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 268–270; *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Company,* 308 U. S. 241, 244–248; *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 705; *National Labor Relations Board* v. *Clausen,* 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *National Labor Relations*

Board v. *Wallick & Schwalm,* 198 F. 2d 477, 483 (C. A. 3); *Angwell Curtain Co.* v. *National Labor Relations Board,* 192 F. 2d 899, 903 (C. A. 7). In any event, even if the evidence to which petitioner objects were excluded, the remaining evidence is ample to sustain the Board's findings.

3. Petitioner contends (Pet., pp. 4, 6, 17–19) that the employees' work stoppage on May 26, 1948, was not caused by petitioner's unfair labor practices and its refusal to grant the employees' economic demands, but only by International Representative Bellew's "anger" and "annoyance" at the Conciliator's failure to apprise him of the postponement of a scheduled negotiation conference, for which the Company was not responsible. This raises only a question of the sufficiency of the evidence to support the Board's finding regarding the cause of the strike. The "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178. In any event, the Board's finding, sustained by the court below, is amply supported.

Moreover, as the court below concluded (R. 1159), even if the strike were caused only by postponement of the bargaining meeting, as petitioner maintains, the strike nevertheless remained a concerted activity protected under the statute, and petitioner's refusal to reinstate the employees for engaging in it was a violation of the Act. For at the most, petitioner would have established that

the employees were unjustified or ill-advised in resorting to strike action. But "the wisdom or unwisdom of the men, their justification or lack of it, in attributing to [petitioner] an unreasonable or arbitrary attitude in connection with the negotiations," is immaterial to the protection the Act extends to employees on strike. *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333, 344–345; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 635 (C. A. 2); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C. A. 3).

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER J. CUMMINGS, Jr.,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

BERNARD DUNAU,
SAMUEL M. SINGER,
Attorneys,
National Labor Relations Board.

FEBRUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided

in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. * * *

(b) Whoever shall be injured in his business or property by reason or [*sic*] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

U. S. GOVERNMENT PRINTING OFFICE: 1959